Editor's note: Appealed -- settled, sub nom. Sammy Goff v. OSMRE, Civ.No. 88-142 (ED KY. May 1989)

SHELBIANA CONSTRUCTION CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

SAMMY GOFF
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-88, 87-307 Decided April 6, 1988

Appeals from decisions of Administrative Law Judge Frederick A. Miller affirming issuance of Notice of Violation Nos. 80-2-79-45, and 80-2-79-45, as modified, and Cessation Order No. 85-83-052-02. Hearings Division Docket Nos. NX 1-2-R, NX 5-49-R, and NX 5-102-R.

Affirmed.

1. Estoppel -- Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

   OSMRE is not estopped to require elimination of highwalls by the fact that its inspectors failed to inform the permittee of this obligation during the course of mining.

2. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

   No authority exists in the Act or regulations to excuse highwall elimination by comparing the costs and benefits of reclamation, or weighing such costs against the degree and kind of wrong involved.

3. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination -- Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

   Where the evidence in a case shows the complete merger of the ownership and control of a corporation, such that

> the corporation is merely acting as the individual's alter ego, the individual cannot be allowed to escape responsibility for the statutory requirement to eliminate highwalls by hiding behind the corporate entity.

APPEARANCES: Charles J. Baird, Esq., Pikeville, Kentucky, for appellants; R. Anthony Welch, Esq., Judith M. Stolfo, Esq., Michael H. Sanders, Esq., Knoxville, Tennessee, and Susan K. Hoven, Esq., Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Shelbiana Construction Company has appealed from a decision of Administrative Law Judge Frederick A. Miller, dated October 2, 1984, affirming the issuance of notice of violation (NOV) No. 80-2-79-45. Sammy Goff has appealed from a second decision of Judge Miller, dated February 13, 1987, affirming the issuance of NOV No. 80-2-79-45, as modified, and cessation order (CO) No. 85-83-052-02. Because these appeals focus on identical facts and similar issues of law, they are consolidated for resolution.

On September 10, 1980, the Office of Surface Mining Reclamation and Enforcement (OSMRE) issued to Shelbiana NOV No. 80-2-79-45 under the authority of section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(3) (1982). This notice alleged four violations of the initial program regulations, of which only one violation presently remains unabated and need concern us here. The regulation at issue, 30 CFR 715.14(b)(ii), requires a permittee to eliminate a highwall by backfilling and grading to the most moderate slope possible. An initial hearing was convened by Administrative Law Judge Tom M. Allen on January 19, 1982, but was interrupted by an interlocutory appeal challenging OSMRE's jurisdiction. 1/ A complete hearing was subsequently held by Judge Miller on May 23, 1984, after which he found the following facts:

> The property which is the subject of this case is located in two separate tracts [in Pike County, Kentucky]. One tract is owned by Sammy Goff and was purchased by him in 1974 for sixty thousand dollars ($ 60,000.00) and consisted of approximately one hundred (100) acres of mountainside land [Transcript at page 8]. Remaining property consisting of approximately thirty-five (35) acres

1/ Shelbiana appealed a ruling by Judge Allen holding that it was barred to challenge OSMRE's authority in this case by its failure to seek review of an earlier NOV. The Interior Board of Surface Mining and Reclamation Appeals (IBSMA) reversed Judge Allen, holding that Shelbiana was not estopped to challenge OSMRE's jurisdiction, the issue not having been previously litigated (Order of Mar. 29, 1982, IBSMA 82-13).

> was purchased by Shelbiana (wholly owned by Sammy Goff) in 1978 for one hundred and forty thousand dollars ($ 140,000.00) (Tr.8). The two tracts of property are contiguous. Prior to the projects being started, all the property was hillside which had been heavily deep mined in the 1950s and 1960s (Tr. 9). [2/] The entire property is adjacent to Kentucky Highway 1460, a heavily traveled road. Prior to construction, there was no access from the state highway to the property due to a deep ravine which had been used as an illegal garbage dump. The garbage dump was approximately 50 feet deep and went the entire distance from the state highway to the mountainside (Tr. 11).
>
> In 1978 the applicant was issued a state construction exemption as the applicant was developing this land for commercial purposes and coal mining was only incidental to said development (Tr. 17). At the outset of said development the subject land contained about thirty deep mines which had been abandoned leaving only low quality coal and emitting red watery drainage (Tr. 36 and 39). Incidental to the commercial development coal was removed, the last coal being removed in 1980. The testimony reveals that while the applicant spent nine hundred and fifty-five thousand five hundred and fifty dollars ($ 955,550.00) developing said site, twenty-four thousand one hundred ninety-two (24,192) tons of coal were removed and applicant received five hundred and thirty-one thousand dollars ($ 531,000.00) in payment for said coal (Tr. 42, 43).

(Oct. 2, 1984, Decision at 2).

Judge Miller further found that despite the highwall caused by Shelbiana's construction, the property was "more valuable, more useful and less environmentally harmful than before the highwall was created" (Oct. 2, 1984, Decision at 2-3). In support, Judge Miller recounted the testimony of real estate appraiser Louis Pipkin, who testified that the value of the property in September 1979 was $ 220,000, but that the value had increased to $ 546,000 as of September 1981.

The facts are undisputed, Judge Miller found, that a highwall, approximately 2,500 feet in length, remained at the conclusion of Shelbiana's project. Relying on James Moore, 1 IBSMA 216, 86 I.D. 361 (1979), the Judge held that OSMRE had jurisdiction to issue NOV No. 80-2-79-45 because Shelbiana had extracted 24,192 tons of coal, easily exceeding the 250-ton jurisdictional amount necessary to be considered a surface coal mining operation. The NOV was properly issued to Shelbiana, Judge Miller concluded, because highwall elimination is an absolute requirement of SMCRA, and neither the Act nor the

2/ Highwalls existed on two levels prior to Shelbiana's activities on the site (1984 Tr. 101).

regulations authorized any balancing of environmental harms so as to permit avoidance of the statutory prohibition against leaving a highwall after mining.

In its appeal of this 1984 decision, Shelbiana argues that OSMRE should be estopped from issuing NOV No. 80-2-79-45 because OSMRE inspectors made three visits to the site before requiring that the highwall be eliminated. By this time, Shelbiana states, materials excavated by it had already been used to fill the nearby ravine. Shelbiana's second argument is that restoration of the highwall is not achievable as a practical matter, does not confer any environmental benefits, and is inequitable considering the degree and kind of environmental harm present.

The hearing revealed that in May and November 1979, OSMRE inspected the site at issue during construction. Most of the highwall was in existence at that time, and most of the overburden was in the ravine or valley fill (1984 Tr. 83). At the time of these inspections, an "administrative problem" existed within OSMRE whether to regard the construction exemption issued by Kentucky as a permit. Id. 3/ OSMRE Inspector Andrews testified that the agency's policy at that time was to refrain from issuing an NOV for highwall reclamation as long as the job was in active status and the highwall did not exceed 1,500 linear feet in length (1984 Tr. 84).

[1] Assuming, arguendo, that estoppel may run against the United States, we hold that Shelbiana has not demonstrated that the traditional elements of estoppel are present here. "A party claiming estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" Heckler v. Community Health Services of Crawford, 467 U.S. 51, 59 (1984). The record reveals, however, that construction began in 1978, prior to any of the 1979 inspections that Shelbiana claims to have misled it (Tr. 102). Indeed, 3,500 tons of coal were mined in 1978. 4/ Shelbiana cannot demonstrate its reliance on OSMRE's behavior during the 1979 inspections when, in fact, it had already decided in 1978 to undertake construction without reclaiming the highwall (1984 Tr. 84). Moreover, Shelbiana was on notice of the requirement to eliminate highwalls by the publication on December 13, 1977, of regulation 30 CFR 715.14(b)(1)(ii) and by the terms of the Act, 30 U.S.C. § 1252 (1982). See Tom Hurd, 80 IBLA 107, 109 (1984).

Even if Shelbiana's argument is that it would have ceased construction in time had OSMRE advised it of its reclamation duties, we do not find that

3/ In both May and November 1979, OSMRE issued other NOV's to Shelbiana. Apparently, the agency's "administrative problem" did not extend to the issue of its jurisdiction over the site (1984 Tr. 31-32). Shelbiana's construction exemption did not require reclamation or elimination of highwalls (1984 Tr. 82).

4/ The 1984 transcript at pages 28-29 indicates that a summation of coal receipts had been admitted as exhibit A-1 of the "original record," presumably a reference to the hearing held by Judge Allen.

OSMRE's conduct rises to the level of affirmative misconduct. In INS v. Hibi, 414 U.S. 5, 8 (1973), the United States Supreme Court noted that it is still an open question whether in some future case "affirmative misconduct" on the part of the Government might be grounds for estoppel. OSMRE's silence in failing to advise Shelbiana of its duty to reclaim the highwall falls far short of the affirmative misconduct described by the Hibi Court. See also Schweiker v. Hansen, 450 U.S. 785 (1981); United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978). Shelbiana's argument also overlooks 43 CFR 1810.3, which provides that "the authority of the United States to enforce a public right or protect a public interest is not violated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties."

With respect to Shelbiana's second argument, that highwall restoration is impracticable, approximately 143,000 cubic yards of materials would be required to accomplish the task described by NOV No. 80-2-79-45 (1984 Tr. 237). OSMRE Inspector Andrews testified that such materials would be available at a price, but that "[t]here would undoubtedly be a surface disturbance associated with the borrow area and conceivably a highwall at the borrow area" (1984 Tr. 91).

[2] Highwall elimination may not be excused by a comparison of its environmental benefits and costs or by balancing those costs against the degree and kind of wrong involved. In River Processing, Inc. v. Office of Surface Mining Reclamation and Enforcement, 76 IBLA 129, 90 I.D. 425 (1983), this Board rejected the notion that the benefits of highwall elimination should be weighed against its costs in determining whether OSMRE properly issued an NOV requiring elimination. Therein at page 137, 90 I.D. at page 429, the Board held:

> This Board finds to be controlling in this case the construction in Tollage Creek [Tollage Creek Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980), aff'd mem., Tollage Creek Elkhorn Mining v. Watt, No. 80-230 (E.D. Ky., Sept. 1, 1982)] that the requirement for complete highwall elimination is an inflexible element of the reclamation prescribed in 30 CFR 715.14 for the return of land disturbed by surface coal mining to its "approximate original contour." We are persuaded to this viewpoint especially by the fact that none of the several provisions for variances from the "approximate original contour" standard allow retention of highwalls. 30 U.S.C. § 1265(b)(3), (d)(2), and (e) (Supp. V 1981); 30 CFR 715.14(c) through (f) and 716.3; 2 IBSMA at 347-49, 87 I.D. at 574-75 (which includes references to legislative history of the AOC requirement). This circumstance evinces a preemptive legislative finding that the risk of environmental harm from unreclaimed highwalls outweighs the potential for benefits from a less than absolute requirement for highwall elimination. See especially H.R. Rep. No. 493, 95th Cong., 1st Sess. 108-09 (1977). Thus, we conclude that

> there is no authority either expressed or implied in the Act or regulations for the evaluation of comparative harms undertaken by the Administrative Law Judge in this case.

Consistent with this approach, we reject Shelbiana's argument that we should compare the costs and benefits of reclamation or weigh such costs against the degree and kind of wrong involved.

Under the initial regulatory program, one who conducts a surface coal mining operation regulated by a state under state law is a "permittee" whether or not required to hold a permit under state law. Jewell Smokeless Coal Corp., 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982). A "permittee" is responsible for compliance with the performance standards applicable to the operation. S & M Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 79 IBLA 350, 355, 91 I.D. 159, 162 (1984). The evidence shows that Shelbiana purchased 35 acres of land involved in the construction project and held a lease to extract the minerals in that acreage. It extracted the coal from that tract and also extracted the coal from the adjacent 100-acre tract owned by Sammy Goff. Shelbiana's actions on each of the two tracts are those of a "permittee." See Marco, Inc., 3 IBSMA 128, 88 I.D. 500 (1981). On each of the two tracts, Shelbiana left a highwall. The assembled evidence indicates that NOV No. 80-2-79-45 was properly issued. Judge Miller's decision affirming the issuance of this NOV to Shelbiana is, accordingly, affirmed.

Following Judge Miller's decision, OSMRE on October 18, 1984, issued a document styled "Modification of Notice of Violation or Cessation Order." This document modified the outstanding highwall violation discussed above by establishing a timetable for moving certain equipment on site (October 30, 1984) and for completing all backfilling and grading (January 19, 1985). The document also contained the following language: "To modify original NOV #80-2-79-45 to read Sammy Goff individual doing business as Shelbiana Construction Company, Inc., as stated in sworn testimony." On October 29, 1984, Shelbiana filed its notice of appeal from Judge Miller's October 2, decision, and Sammy Goff filed his application for review of the modified NOV. On January 2, 1985, OSMRE modified NOV No. 80-2-79-45 a second time. This second modification reads as follows: "To modify NOV 80-2-79-45, dated 9-10-80 as modified 10-18-84 to read 'Shelbiana Construction, Inc,' and Sammy Goff, an individual, doing business as Shelbiana Construction, Inc." Finally, on May 8, 1985, OSMRE served CO No. 85-83-052-02 on Sammy Goff for failure to abate the highwall violation identified in the NOV. This CO was issued in the same manner as the first modified NOV. An application for review of this CO was filed on June 6, 1985, by Sammy Goff.

Though this second modification is a nullity because it was issued while jurisdiction over the subject matter was in the Office of Hearing and Appeals, Gateway Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 84 IBLA 371 (1985), the second modification may, nevertheless, be used to interpret the above-quoted language (naming Sammy Goff as a party) in the first modification. So used, we find that the purpose of this quoted language

was to charge both Goff and Shelbiana for the violations set forth in NOV No. 80-2-79-45. 5/ A hearing into Goff's liability for the outstanding highwall was held on August 14, 1986.

At this hearing, Goff testified that Shelbiana leased the coal under its 35-acre tract from a Doctor Thompson; Sammy Goff was the owner of the minerals underlying his adjacent, 100-acre tract (1986 Hearing at 44 (hereafter 1986 Tr.)). All proceeds from the sale of coal on the Goff and Shelbiana tracts were deposited in Shelbiana's account (1986 Tr. 33). Goff did not lease the coal on his tract to Shelbiana and did not receive any royalties from sales of such coal (1986 Tr. 44, 47). Excavation was performed by Shelbiana, and men working on the project were paid by Shelbiana (1986 Tr. 32-33). Equipment used during mining was owned by Shelbiana and by Goff (1984 Tr. 59; 1986 Tr. 48).

Goff directed the day-to-day activities at the excavation site (1986 Tr. 47). As president of Shelbiana, Goff decided to leave the highwall standing on the Shelbiana tract; as the individual owner of the 100-acre tract, Goff decided to leave the highwall standing there (1986 Tr. 46). Goff also authorized the removal of fill material from this 100-acre tract (1986 Tr. 42). No money was received from this transaction. Id.

Goff was the president, sole officer, sole director, and sole shareholder of Shelbiana, a corporation in good standing in the State of Kentucky (1986 Tr. 20, 43-44, 57). The corporation had no Board of Director's meetings, and Goff had "absolute authority over what was done and not done" (1986 Tr. 44). Goff took no salary, officer's fee, or director's fee from the corporation (1986 Tr. 33).

On the basis of the above evidence, Judge Miller held that Goff was clearly a "permittee" as to the 100-acre tract owned individually by him and, therefore, was properly named in the CO and modified NOV. Judge Miller also stated that Goff had control over the entire minesite, including the 35 acres owned by Shelbiana. Responding to Goff's argument that he (Goff) was not responsible for the acts of the corporation, Judge Miller held that "justice requires that Goff be held liable for the resulting harm based on the alter ego theory." Judge Miller found that the alter ego theory, as set forth in White v. Winchester Land Development Corp., 584 S.W.2d 56 (Ky. Ct. App. 1979), applied in this case. That theory, as set forth in White, permits shareholders to be held responsible for corporate liabilities where:

> (1) * * * the corporation is not only influenced by the owners, but also * * * there is such unity of ownership and interest that their separateness has ceased; and (2) * * * the facts are

5/ This interpretation is consistent with OSMRE's pleading of Aug. 22, 1985, stating that its second modification was issued to "eliminate the interpretation that Shelbiana was no longer named as a responsible operator." Id. at 2.

> such that an adherence to the normal attributes, viz., treatment as a separate entity, of separate corporate existence would sanction a fraud or promote injustice.

Id. at 61.

[3] The question presented on appeal is whether Judge Miller properly invoked the alter ego theory to find Goff personally responsible for the acts of Shelbiana. The alter ego theory is an equitable principle designed to prevent an entity from doing business and then escaping responsibility by hiding behind the corporate shield. Alkire v. N.L.R.B., 716 F.2d 1014 (4th Cir. 1983). Courts utilize the theory to prevent fraud, illegality, or injustice or when recognition of the corporate entity would defeat public policy or shield someone from public liability for a crime. Publicker Industries, Inc. v. Roman Ceramics Corp., 603 F.2d 1065, 1069 (3rd Cir. 1979); see N.L.R.B. v. Allcoast Transfer, Inc., 780 F.2d 576, 579-82 (6th Cir. 1986). Whether or not the alter ego doctrine should be applied in a particular case is dependent upon the "innumerable individual equities of each case." United States v. Standard Beauty Supply Stores, Inc., 561 F.2d 774, 777 (9th Cir. 1977).

In a case involving SMCRA, United States v. Daugherty, 599 F. Supp. 671 (D. Tenn. 1984), the court examined whether the alter ego theory should be applied to hold an individual liable for a corporate debt, i.e., a civil penalty assessed under SMCRA. The court set forth the applicable Kentucky law to be applied as follows:

> [T]he Kentucky courts have stated that, under the alter ego theory, where there is such a unity of ownership that the corporate separateness has ceased and treatment as separate entities would sanction fraud and promote injustice, the corporate entity should be disregarded. White v. Winchester Land Development Corp., 584 S.W.2d 56 (Ky. App. 1979). The following factors must be considered in determining whether disregard of the corporate entity would be appropriate: (1) undercapitalization; (2) failure to observe corporate formalities; (3) nonpayment or overpayment of dividends; (4) siphoning of funds by majority stockholders; (5) guarantee of corporate liabilities by majority stockholders. Id. at 62. [6/]

Id. at 673.

The relevant facts in this case are that Goff was the president, sole officer, sole director, and sole shareholder of Shelbiana (1986 Tr. 43-44,

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6/ After reviewing the facts in the case and weighing the factors, the Daugherty court found "insufficient grounds to disregard the corporate entity." Id. at 674. However, whether or not the alter ego theory should be applied depends on the particular facts of each individual case.

57). Goff took no salary, officer's fee, or director's fee from the corporation (1986 Tr. 33). The corporation never had any stockholder meetings or board of director's meetings (1986 Tr. 44). Goff had absolute authority over what was done and not done on the minesite in question (1986 Tr. 44). He stated that he "[p]retty much" directed day-to-day activities on the Goff and Shelbiana tracts and that he determined how things were to be done (1986 Tr. 47). Goff owned the minerals under the Goff tract. He did not lease the minerals to Shelbiana; he just let the corporation take them (1986 Tr. 44). The 24,192 tons of coal removed from the two tracts were sold for $ 531,000 (1984 Tr. 42-43). All the money received from those sales was deposited in the corporate bank account (1986 Tr. 32-33). In addition to equipment owned by Shelbiana, Goff used his own equipment on the site (1984 Tr. 48-49). As president of Shelbiana, Goff decided to leave the highwalls on the Shelbiana tract (1986 Tr. 46). Goff testified that he personally paid a substantial number of Shelbiana's bills during the project (1984 Tr. 56; 1986 Tr. 29). Also, the record shows that the corporation repaid a $ 16,500 loan from Goff. (1986 Tr. 31).

These facts must be examined in light of the factors outlined by the court to determine whether Shelbiana was the alter ego of Goff. It is difficult to understand the significance of the undercapitalization factor, since, as stated by the court in White v. Winchester Land Development Corp., supra at 62, "Kentucky law does not require any minimum paid-in capital before a corporation begins to do business." Thus, whether or not Shelbiana was undercapitalized is not significant in this case.

There is no evidence of corporate formalities. Nor is there any evidence that Shelbiana ever paid any dividends. There is no indication that funds were siphoned by Goff from Shelbiana; however, Goff and the corporation commingled assets while developing the two tracts. The money obtained from coal sales from the tract was placed in Shelbiana's bank account. Even though Shelbiana was mining the coal from the Goff tract without a lease, Goff received no payments for the coal. Goff also allowed Shelbiana to use his equipment on the site without charging the corporation any rental. Finally, Goff testified that he personally paid a substantial number of Shelbiana's bills during development of the site and the record shows he also loaned money to the corporation.

We realize that under Kentucky law the corporate veil is pierced only "reluctantly and cautiously." See White v. Winchester Land Development Corp., supra at 62. Nevertheless, we find that under the circumstances of this case there are sufficient grounds for invoking the alter ego theory to pierce the corporate veil of Shelbiana to find Goff liable for the highwall violation on the Shelbiana tract, as well as on the Goff tract. The public policy considerations which led to passage of SMCRA dictate that where, as in this case, there is a complete merger of the ownership and control of a corporation with that of an individual, such that the corporation is merely acting as the

individual's alter ego, the individual cannot be allowed to escape responsibility for SMCRA's reclamation requirements by hiding behind the corporate entity. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Miller's decisions are affirmed.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge

7/ We note that OSMRE also argues that Goff and Shelbiana were involved in a joint venture. OSMRE asserts that as joint venturers, under Kentucky law, Goff and Shelbiana are jointly and severally liable for the reclamation of the minesite. We need not address that argument given our holding on the alter ego theory.

ADMINISTRATIVE JUDGE ARNESS DISSENTING IN PART:

I disagree with both the majority opinion and with Judge Miller when they find that justice requires the corporate veil to be pierced to hold Sammy Goff personally responsible for the acts of Shelbiana Construction Co. The opinion upon which both rely, White v. Winchester Land Development Corp., 584 S.W. 2d 56 (Ky. Ct. App. 1979), admonished that "the corporate veil should only be pierced 'reluctantly and cautiously'" (584 S.W. 2d. at 62). Though I do not deny that Shelbiana is controlled by Goff, this fact alone does not deny him the limited liability accorded to shareholders. No evidence of fraud or injustice is present in the record. Significantly, in United States v. Daugherty, 599 F. Supp. 671 (D. Tenn. 1984), relied upon by the majority as the source for Kentucky law to support their conclusion that the "alter ego" doctrine may be properly invoked in this case, the court refused to pierce the corporate veil in the absence of proof of fraud. This appears to be generally true in the cases considering whether it is permissible to ignore the existence of the corporate structure. Indeed, in this case there is no indication in the record that such a drastic remedy is warranted for any purpose, since there is no suggestion that Shelbiana is not responsible for the consequences of its operations.

To casually pierce the corporate veil for no apparent reason is not only contrary to state law and Federal cases dealing with this subject, it conflicts with the implicit recognition of the deference owed to such law given by recent Departmental rulemaking announced at 53 FR 8752-8755 (March 17, 1988). This regulation, which amends 43 CFR Part 4, and which does not become effective until April 18, 1988, supplies a legal basis for finding agents and employees of corporations personally liable in surface coal mining cases involving assessment of civil penalties. The regulation deals directly with situations of the sort here before us, where an individual is sought to be charged for conduct performed ostensibly on behalf of a corporation.

In the preamble to this rule, the Department declares that "[t]hese rules are necessary." Id. at 8752. Assuming that to be true, then prior to the issuance of these regulations there has been no Federal law in this area to supplant existing norms established by the states, and without such authority we are clearly going beyond our authority when we ignore the corporate structure to impose individual civil penalties upon a corporate employee or officer. Since Shelbiana was a corporation in good standing in the state of incorporation, absent a showing of fraud there was simply no legal basis for piercing the corporate veil as was done in this case. White v. Winchester Land Development Corp., supra.

Even were we to assume that the not-yet-effective regulation could be applied in this case, there does not appear to be a basis for holding as the majority does on this issue. The ultimate burden of proof to show that an "individual willfully and knowingly authorized, ordered, or carried out the

corporate permittee's violation or failure or refusal to comply" is placed upon OSMRE by the new regulation. Id. at 8755. Thus, in the absence of a showing of fraud, or even of necessity, I would conclude that, even if these regulations were effective here, that OSMRE had failed to carry the burden of proof imposed by the new regulation. All that has been shown here is that Shelbiana is a closely held corporation. That is not enough to warrant disregarding the corporate existence.

There can be no doubt that Goff is responsible for highwall elimination on the 100-acre tract owned by him. In S & M Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 79 IBLA 350, 91 I.D. 159 (1984), the Board held that the owner of a parcel of land was properly cited for a violation occurring there where the coal was mined by an operator pursuant to an oral lease and no permit was extant at the time of inspection. Key to this decision was a determination of who had control of the surface mining operations. One capable of control could be regarded as a permittee and cited for violations of the Act. Id. at 358 (91 I.D. at 163). In the present case, no evidence of an oral (or written) lease between Goff and Shelbiana exists, a fact that increases Goff's control over the operations on the 100-acre tract. No mining permit has ever existed on the 100-acre tract. I agree that Goff controlled surface mining operations on this tract and is properly regarded as a permittee. As such, he is responsible for highwall elimination on the 100-acre tract.

Whether or not Goff, as an individual, had control over operations on the 35-acre tract owned by the corporation is confused by the fact that as the sole officer of Shelbiana, he was authorized to control operations on that tract. There is no doubt that Goff directed the day-to-day activities on the 35-acre Shelbiana tract (1986 Tr. 47), but the question remains whether Goff did so as an officer of the corporation or as an adjacent landowner financially interested in a common project. Similar confusion prevents us from determining whether a joint venture existed between Goff and Shelbiana, as OSMRE contends it did. The elements of a joint venture, as set out by OSMRE in its argument on this point are these: "(1) an agreement, express or implied; (2) a common purpose; (3) a community of pecuniary interest in that purpose; and, (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control" (OSMRE Brief at 7). Since, however, Shelbiana received all proceeds from the sale of coal, it is difficult to identify Goff's pecuniary interest in the Shelbiana project. Moreover, whether Goff and Shelbiana possess an equal right of control over the project is blurred by the failure of the parties to identify the source of decision-making. Certainly, it is impossible to find that each enjoyed an equal right of control.

I therefore agree that Shelbiana was properly cited in NOV No. 80-2-79-45 for failure to eliminate highwalls on each of the two tracts at issue; it was also properly cited in CO No. 85-83-052-02 for its failure to abate this violation. I also agree that Sammy Goff, as an individual, was properly cited in NOV No. 80-2-79-45, as modified,

for failure to eliminate highwalls on the 100-acre tract owned by him, and that he also was properly cited in CO No. 85-83-052-02 for failure to abate his violation on his separately-owned land. I do not agree, however, that he was responsible personally for the 35-acre tract owned by Shelbiana, and therefore dissent from that portion of the majority opinion which affirms Judge Miller's erroneous finding that the corporate organization of Shelbiana might be disregarded to permit Goff to be held responsible for the violation on the Shelbiana land.

Franklin D. Arness
Administrative Judge